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In The

Supreme Court of the United States

October Term 1972

No. 72-177

HOWARD STATON MILLER,

Petitioner,

v.

A. E. SLAYTON, JR., SUPERINTENDENT, VIRGINIA STATE PENITENTIARY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

The respondent, A. E. Slayton, Jr., Superintendent of the Virginia State Penitentiary, respectfully prays that a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 30, 1972, not be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 457 F.2d 700 and is set forth in the appendix to the petition for a writ of certiorari at pgs. 1a-7a. The opinion of the United States District Court for the Eastern District of Virginia is unrecorded and is set forth in the appendix to the petition for a writ of certiorari at pgs. 9a-15a. The order of the United States Court of Appeals for the Fourth Circuit denying the petition for a rehearing in banc is set forth in the appendix to the petition for a writ of certiorari at page 8a.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether The Appearance Of Conflicting Interest Among Indigent Co-defendants Being Jointly Tried Imposes A Constitutional Duty On The Trial Court To Appoint Separate Counsel For Each?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

Section 19.1-202 of the Code of Virginia (1950), as amended:

> "If a person, indicted jointly with others for a felony, elects to be tried separately, the venire summoned for their trial may be used for him who has first tried and the Court shall award a venire facias for the trial of the others, jointly or separately, as they may elect."

STATEMENT OF THE CASE

Howard Staton Miller is applying for a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit of March 30, 1972, which judgment affirmed the decision of the United States District Court for the Eastern District of Virginia, Norfolk Division of October 7, 1970, denying and dismissing a petition for a writ of habeas corpus filed by Miller. A petition for a rehearing in banc was denied by the United States Court of Appeals for the Fourth Circuit on May 1, 1972.

Howard Staton Miller was convicted of one count of armed robbery, one count of abduction and one count of unauthorized use of an automobile on May 28, 1968, in the Hustings Court of the City of Richmond, Part II. The trial was conducted without a jury before Judge William E. Spain and on July 31, 1968, the petitioner was sentenced to fifteen years for armed robbery and five years for abduction, with the two terms to run consecutively. He was also sentenced to one year in the State Penitentiary for unauthorized use of an automobile with this sentence to run concurrent with the other two sentences. Miller noted an appeal but the Supreme Court of Appeals of Virginia denied a writ of error on December 6, 1968. The petitioner subsequently filed a petition for a writ of habeas corpus in the Hustings Court, Part II, of the City of Richmond on March 18, 1969, and that petition was ultimately denied and dismissed by order of that Court of September 11, 1969. A petition for a writ of error was filed in the Supreme Court of Appeals of Virginia and a writ of error was denied by that Court. The instant proceeding in the Federal Courts ensued.

STATEMENT OF FACTS

In the early morning hours of Sunday, April 7, 1968, three black men went to the Kayo gas station at 2605 Hull

Street in South Richmond and went into the restroom (Tr. 28-30). Some one-and-a-half hours later, around 1:30 a.m., the three men returned and one of them, identified as Lavone Robbs, asked the attendant Earl Johnson for a quarter in exchange for some loose change (Tr. 22). Johnson gave Robbs the change and was met with a gun and a demand for all the money from the station (Tr. 23). He turned over $70.00 and one of the three asked for a key to the desk drawer which request was complied with and the drawer was opened and rolls of coins removed (Tr. 23). The three men then broke open the bottom of the desk but they discovered nothing of value there. The assailant with the gun asked for the keys to Johnson's car and Johnson was forced to join the three men in his own car (Tr. 25-26). They went a few blocks when a police car turned the corner and the abductor driving the car hit the brakes and the three men jumped out of the car and ran (Tr. 26).

Detectives Windsor and Fitzgerald were on patrol on the night in question as it was the second night of civil disorders in Richmond following the death of Martin Luther King, Jr. (Tr. 39). They had pulled into the parking lot at Siegel's Grocery Store when a private citizen drove up and, pursuant to information obtained from him, the detectives proceeded to the Kayo gas station (Tr. 39-40). From information obtained during their investigation a radio broadcast was made for an automobile occupied by Earl Johnson and three black males (Tr. 40).

Shortly thereafter Detectives O'Brien and Kahn heard the all-units broadcast and saw an automobile fitting the description radioed (Tr. 47). They saw three black males jump out of the vehicle and run but they could not identify or apprehend any of them (Tr. 47-48). Around 3:30-4:00 a.m. Patrolmen Foore and Baum were working the down-

town Richmond area due to the disturbances when they saw three black males in the area of Fifth and Byrd Streets (Tr. 51). The officers turned and the three men started running (Tr. 51-52). The patrolmen broadcast that they were in pursuit and they followed the three men into some woods. They called for the three men to stop and fired a shot into the air (Tr. 52). As they went through the woods they discovered petitioner and Lavone Robbs lying in the brush in the 400 block of Byrd Street (Tr. 52). At this point Detectives Wright and Marcuson responded to the broadcast from Foore and Baum and found petitioner and Lavone Robbs being held by the patrolmen (Tr. 56-57). Petitioner and Lavone Robbs were placed under arrest for the charges in South Richmond and a search of petitioner resulted in the discovery of three rolls of pennies, a roll of nickels, fifty-six cents in loose change and $28.00 in bills (Tr. 52).

Petitioner and Lavone Robbs were transported to the Detention Section at Richmond Police Headquarters where Grover Robbs was already in custody (Tr. 40-41). All three men were fully advised of their rights and Grover Robbs pointed out petitioner and Lavone Robbs as having been with him during the robbery (Tr. 41-42, 45-46). Petitioner said nothing at the time of this accusation by the co-defendant but before and after that confrontation he denied his complicity (Tr. 42, 45-46). Earl Johnson positively identified petitioner and his co-defendants at trial (Tr. 26-27, 38).

Warrants were sworn on the date of the arrest and they were executed on that date as well (R. 1, 2, 3). On April 8, 1968, petitioner appeared in Police Court, Part II, of the City of Richmond and A. Clair Sager of the Richmond Bar was appointed by the court to represent him (R. 9). The case was continued to April 16th and again to May 2nd

(R. 1, 2, 3). On this date the case was transferred to the Juvenile and Domestic Relations Court, Sager was re-appointed and the case continued to May 6th (R. 1, 2, 3, 4, 8, 21). On May 6th the charges were certified to the Grand Jury and true bills were returned on the indictments on May 13, 1968 (R. 3, 5, 8, 15, 17, 21, 24-25, 28, 32-35). Sager was again appointed to represent petitioner (R. 36). The trial was held on May 28, 1968, before a judge trying the case without a jury. That trial resulted in petitioner's conviction of abduction, robbery and unauthorized use of an automobile and his acquittal of a charge of grand larceny. At the request of counsel, a pre-sentence report was ordered and on July 31, 1968, petitioner was sentenced to fifteen years for armed robbery, to five years for abduction and to one year on the unauthorized use charge with the latter sentence to run concurrent with the prior two. On August 19, 1968, petitioner's counsel made a motion to set aside the judgment which was overruled (R. 54) and Sager was appointed to represent petitioner on appeal (R. 55). The Supreme Court of Appeals denied a Writ of Error on December 6, 1968.

ARGUMENT

The Decision Of The United States Court Of Appeals For The Fourth Circuit That This Court's Prior Determination In Bruton v. United States, 391 U.S. 123 (1968), Was Not Applicable To The Petitioner's Case Was Correct And Especially In Light Of The Court's Determination That Any Erroneous Admission Of Evidence Was Harmless Beyond A Reasonable Doubt.

The petitioner requests this Court to grant certiorari in this case for the purpose of seeking the transmutation of your Honors' decision in *Bruton* v. *United States, supra,* into a *per se* rule applicable to non-jury as well as jury cases. The arguments advanced on behalf of petitioner are interesting but are not applicable to the factual situation in this

case. Many of the allegations made relative to the conflict of interest and to the question of the effectiveness of counsel are almost totally speculative and are not based on fact.

For example, the trial court in this case made a full and complete investigation into the understanding and desire of the three defendants with regard to their being tried together, concerning the three charges being tried in a single proceeding, concerning their desire for a judge or jury trial, concerning the availability and desirability of witnesses and concerning the possibility of conflict of interest. Prior to arraignment, the question of the possibility of a conflict of interest was discussed thoroughly between the Court and counsel as follows:

> "The Court: Well, one other question. Mr. Sager, is there any possibility in your mind or foreseeable that there may be any conflict between your representation of these three men?
>
> "Mr. Sager: No, Your Honor, I have gone into that rather thoroughly and I have had repeated interviews with these men.
>
> "I wish to state for the record that on first blush it might have been my modus operandi in these cases to make the Commonwealth's Attorney elect which one of these indictments he wished to proceed under, and have separate trials for each one on each indictment, and we would fill up all the available dates for the next month or so, but I have left that matter entirely to these men. I have explained the pros and cons of a jury trial thoroughly with them, and their expression here is of their own predilection and their own avenue. I have given them time to think it over, Your Honor." (Tr. pp. 9-10)

This is not a case in which a conflict of interest allegedly arose by surprise and had not been previously considered by the trial defense counsel. Here the defense counsel had

thoroughly considered the possibility of a conflict and had apparently discussed many of the elements which might go into such conflict with his clients. It was his determination that no such conflict existed and it is further submitted that this judgment is borne out by the transcript of the proceedings in the Hustings Court, Part II, of the City of Richmond. Canon 5 of the *Code of Professional Responsibility and Canons of Judicial Ethics of the American Bar Association* states that: "A lawyer should exercise independent professional judgment on behalf of the client," and that is precisely what the trial defense counsel did in this case. The *Code of Professional Responsibility* goes on to point out that:

> "Typically recurring situations involving potentially differing interest are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, and insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interest of multiple clients in these and similar situations depends upon an *analysis of each case.* In certain situations, there may exist little chance of the judgment of a lawyer being adversely effected by the slight possibility that the interest will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely." (E.C. 5-17, ABA Code of Professional Responsibility; emphasis supplied.)

It is submitted that in this case the trial defense counsel was aware of the possibility of conflict, he analyzed the situation, and he determined that such a conflict did not exist after an apparently full discussion of the case and its various ramifications with all three defendants. A review of the records below substantiate his conclusions and vindicate his judgment.

The petitioner and his co-defendants were not tried before a jury, unlike the defendant in *Glasser* v. *United States*, 315 U.S. 60 (1942), the evidence of guilt as opposed to that of innocence is not finally balanced in this case and the possibility of conflict does not become even the feather that might arguably tip the scales of justice. As the Court of Appeals pointed out, the error, if any, in this case was not of a constitutional magnitude and there was "overwhelming" evidence of guilt without regard to any arguably inadmissible evidence (*Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969)).

It is also submitted that the recent decisions of this Court in *Dukes* v. *Warden*, 32 L.Ed.2d 45 (1972) and *Schneble* v. *Florida*, 31 L.Ed.2d 340 (1972), are apposite to this case. As a matter of fact, it is perhaps significant that the petitioner in his brief does not once cite this Court's decision in *Schneble* which appears to be relevant, if not controlling, to this case. It must be kept in mind that even *Schneble* and his co-defendant were tried before a jury and not before a judge as occurred in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ROBERT E. SHEPHERD, JR.
Assistant Attorney General

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of October, 1972, I mailed copies of the foregoing brief for the respondent in opposition to the granting of a petition for a writ of certiorari to Harvey E. Bines, Esquire, Assistant Professor of Law, The Law School, University of Virginia, Charlottesville, Virginia 22901, to Melvin L. Wulf, Esquire, Sanford J. Rosen, Esquire and Joel M. Gora, Esquire, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010 and to Richard Crouch, Esquire, % American Civil Liberties Union of Virginia, 10 South 10th Street, Richmond, Virginia 23219, counsel for petitioner.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General